APPEAL NO. 93079

This appeal arises under the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. arts. 8308-1.01 through 11.10 (Vernon Supp 1993). On December 29, 1992, a contested case hearing was held in (city), Texas, with (hearing officer) presiding. He kept the record open until January 4, 1993, to accept a doctor's report from the appellant, claimant herein, and then determined that claimant did not have disability as a result of an injury on (date of injury). Appellant asserts that Findings of Fact Nos. 3 and 4 are incorrect and that he was not able to retain a job because of the injury in question. Respondent replied that the evidence supported the decision.

DECISION

Finding that the evidence sufficiently supports the decision, we affirm.

The only issue in this case is whether the claimant has disability from an injury to his back incurred on (date of injury). The carrier acknowledged that there was no dispute of the injury. Prior to the injury claimant acknowledged that he had been offered and accepted another job with another employer, which he began on approximately March 15, 1992. In his subsequent job as a truck driver, claimant testified that he made as much as $500.00 per week and as little as $130.00; claimant brought no documents to the hearing indicating that his wages were not equivalent to those he made while working for the city when he hurt his back. Claimant testified that because of medication he was taking, he at times got to work late in his subsequent trucking job and lost that job for that reason. The carrier provided documentation from the trucking employer that indicated claimant was fired on April 10, 1992 by that employer for not following company policy. The reason for claimant's departure was said to be protected from disclosure "under the privacy act," but did "not involve any physical injury are back problems." (sic) Claimant testified that he had not worked since that time because of the injury in question.

In answer to carrier's questions, the claimant said he had never had a back injury before; he repeated this assertion and was adamant about it. The medical records in evidence show that a history of prior back injury was recorded. More detrimental to claimant is an MRI dated April 23, 1992 which shows "unremarkable lumbosacral MRI examination" and "No change since prior examination of 5/8/91." The medical records in evidence are replete with statements such as "seen for similar problem last year and had MR" (as noted by [Dr. C]), "magnifying his weakness," "magnifying his limitations in ROM," "magnifying his pain" (as reported by the physical therapist on May 20, 1992), "apparently the patient had an MRI in May 1991 which was also normal" (as stated by [Dr. J]), "[h]ad a similar episode of low back pain in the early part of last year" (from [Dr. P] who reported a normal EMG), and, again from Dr. J, "no objective findings to support his complaints, and in fact has inconsistent findings on his exam." In sum, these medical records, from four doctors, do not support the assertion that the claimant has disability.

Claimant also asserts that he provided a report from (Dr. M), prior to the evidence

closing on January 4, 1993, but that the hearing officer did not enter it as evidence. On the contrary, the hearing officer's opinion clearly states on page 2 thereof, "Claimant's Exhibits: 1. Medical report from [Dr. M], D.C., received 1-4-93 (Admitted)." This health care provider said in that report that claimant should not repeatedly bend, stoop, and twist; advise was given against repeated lifting over 15 pounds.

As stated, claimant testified that he lost his job as a truck driver because the medicine he had to take for the injury in question caused a sleep problem. However, (Dr. G) reports in early May 1992, that claimant "will not follow directions. Stopped taking medication because he said it ran his blood sugar up. Refused to let us check his blood sugar." Earlier, Dr. M, on April 15, 1992, said that "[t]his patient is not following orders nor is he taking the medication given as directed." Although this doctor states that he discussed the importance of following orders with claimant, he makes no note that claimant explained that the medicine was causing him to be late for work; claimant similarly was not noted to have asked that his medication be changed to address that assertion.

The hearing officer is the sole judge of the weight and credibility of the evidence. *See* Article 8308-6.34(e) of the 1989 Act. He could consider claimant's assertion that he could not work because of the injury to be questionable in light of claimant's subsequent employer's letters about the basis for termination in April 1992. He could also question claimant's credibility based on claimant's denial of a prior back injury in the face of significant medical evidence to the contrary. On the other hand, claimant had only chiropractic evidence obtained after the hearing to indicate any medical problem that could possibly be associated with his lack of work. No medical evidence provided at the hearing indicated any limitation of claimant's ability to work after June of 1992.

The findings that claimant was able to obtain a job for the truck line at a wage greater than what he had made for the city and that claimant did not lose the trucking job because of the injury of (date of injury), are sufficiently supported by the evidence. The order of the hearing officer is not against the great weight and preponderance of the evidence and is affirmed.

Joe Sebesta
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Susan M. Kelley
Appeals Judge